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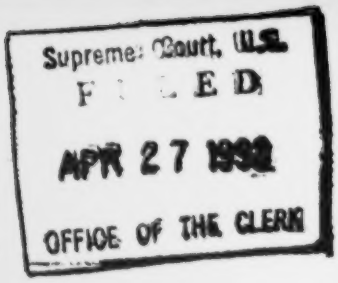

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAYMOND COMER
and MARION CORN — PETITIONER

V.

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

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81

(a) QUESTIONS PRESENTED FOR REVIEW

I. After First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 308 (1987), may a state cut off a business property's direct access to a major thoroughfare, without compensation, leaving the property's only access to traffic so long and circuitous that business can no longer be conducted there?

II. Can compensation be denied after it has once been determined (and upheld in the highest appellate court of the state) that it cannot be denied, and then after a judge trial has been held, and then a jury trial has been held, both based on that prior determination?

(b) LIST OF ALL PARTIES

1. The Movants are Raymond Comer and Marion L. Corn.

2. The Respondent is the Commonwealth of Kentucky.

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(d) REPORTS OF OPINIONS

The only reported opinion is the Opinion of the Second Panel of the Court of Appeals of Kentucky which will be reported at ___ S.W.2d ___ (1992). The opinions are all appended hereto and include (1) the initial written order of the trial judge (no reasoning was included), (2) the Opinion of the Court of Appeals of Kentucky on the first appeal, (3) the oral opinion of the trial judge after the judge trial, (4) the oral opinion of the trial judge after the jury trial, (5) the opinion of the Second Panel of the Court of Appeals of Kentucky which is later to be reported. Actions by the Supreme Court of Kentucky were not by opinion, but are also appended.

(e) GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED:

(i) The decree of the Supreme Court of Kentucky sought to be reviewed

(upholding the Opinion of the Second Panel of the Court of Appeals of Kentucky) was rendered on the 1st day of April, 1992.

(iv) Jurisdiction is conferred on this Court by 28 U.S.C. §1257.

(f) CONSTITUTIONAL PROVISIONS

Amendment V to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of Amendment XIV to the Constitution of the United States provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(g) **STATEMENT OF THE CASE**

Raymond Comer and Marian Corn each owns a small tract of land in Lexington, Fayette County, Kentucky. On each tract stands a building which was formerly used by its owner for commercial purposes. Each owner has devoted his entire financial resources, and the entire energy of his adult life -- over a period exceeding 40

years -- to building and maintaining the businesses operated there. Each property was very valuable (and each business was very successful) because it was accessible from South Broadway Street in Lexington, the highly travelled street on which each abutted, by a less-than-a-hundred-foot drive on a service road called Scott Street.

The Kentucky Highway Department then changed the grade and location of South Broadway, so that at the point Messrs. Corn and Comer had access to it, there is no longer access: Scott Street became a cul-de-sac where it used to intersect South Broadway.

Now, a driver driving <u>north</u> on South Broadway who caught a glimpse of one of these former commercial properties would have to drive 8/10ths of a mile to get to them -- making three right turns (if he or

she could find them) through industrial neighborhoods, across several railroad crossings, taking what the Commonwealth modestly describes as a "circuitous" route to get back to the service road (Scott Street) and these properties. Messrs. Corn and Comer have always called this a "near impossibly" circuitous route.

Any potential customer driving to the south on South Broadway would have to guess which left turn could be taken (the first three possibilities are dead end streets), and then drive some mile and a half, through similar neighborhoods, to get to this property. This route is even more nearly impossible to traverse.

A driver wanting to get to these properties from any point to the west would have to choose either the southern (1½ miles) or the northern (8/10ths mile) route.

The uncontradicted proof at the hearing before the trial judge (and later before the jury by the witnesses for both sides) was that the value of these properties was so devastated by this impossible circuity that it could no longer be used for commercial purposes.

It was proved at the threshold hearing before the trial judge (on the issue of whether "reasonable access" was retained after South Broadway's reconstruction) that these properties could no longer be used for their current businesses, or for any commercial use. Based on that testimony, and upon the trial judge's judicial notice of this area, he determined the obvious -- that "reasonable access" was not retained.

At the trial on the merits, where the same issue was a part of the "highest and best use" analysis of each expert witness,

the testimony was perhaps even more dramatic. The Commonwealth's witness, for example, testified:

> We better go take a look at it and see what the highest and best use of it is now...[I]n my opinion, it's a different kind of property...so we've got to find some other use for it.

Messrs. Corn and Comer's expert said:

> The hotel property is no longer the highest and best use. It's not a hotel and bar. It's a vacant lot. The Comer's property is no longer suitable for a bar and a nightclub. It is a vacant lot. The building doesn't contribute anything to the value of it, and it's just a vacant lot. Now, a vacant lot, you can park cars on it and that's all I can figure that it would be good for at this time.

(h) Proceedings Below

This case was filed in the Fayette Circuit Court. The first Question raised here was detailed in paragraph 11 of the Complaint, which Complaint begins on the first page of the record.

The parties stipulated much of the physical facts involved in this case, including an aerial map which showed the various routes the driver would now have to take to get to the Corn and Comer properties. The Commonwealth filed a motion to dismiss Corn and Comer's Complaint, which was heard by Judge N. Mitchell Meade of the Fayette Circuit Court. Judge Meade determined (as a matter of law) that "mere circuity" of travel -- no matter how difficult and how devastating -- does not give rise to a claim of taking without due process.

This case was then appealed to the Court of Appeals of Kentucky the first

time. The Notice of Appeal appears on page 76 of the record. It was heard by a panel composed of Judges Dyche, Elswick and Lester ("the First Panel"). The first Question raised by this Appeal was determined favorably to Messrs. Corn and Comer; that is, Judge Meade was reversed. The First Panel relied on Commonwealth v. Jent, 525 S.W.2d 121 (Ky. 1975), one of a substantial line of authority of decisions of the highest court of Kentucky, providing that the state's police power does not extend to taking away a property owner's access to the highway abutting his or her property without compensation, save and except where the state leaves the property owner "reasonable access" after the highway change is made.

The Commonwealth then moved the Kentucky Supreme Court for Discretionary Review, which was denied.

The case then returned to the Fayette Circuit Court for a determination, FIRST, whether "reasonable access" had been left to the Corn and Comer for their commercial properties; and then, if not, SECOND, for a trial by jury on their damages. As noted, a hearing was held by the Fayette Circuit Court on the FIRST issue; and Judge Meade determined (as was obvious) that "reasonable access" had in fact been taken from Corn and Comer. The nearly impossible circuity was found to be devastating -- after expert proof was heard about the effects of the agreed physical facts. The Commonwealth appealed; and after the matter was briefed, the Court of Appeals dismissed the appeal as premature.

The case then returned to the Fayette Circuit Court for a trial by jury, which (as noted) was then held; and Messrs. Corn and Comer were awarded substantial damages.

On appeal, the Court of Appeals, sitting as a panel composed of Judges Howerton, Schroder, and Wilhoit ("the Second Panel"), determined as a matter of law that where property is destroyed solely by reason of the "circuity of travel" of the traveling public being required, that there can be no damages awarded.

One portion of the Second Panel's Opinion deserves special attention. The following true statement of facts had been made by the Commonwealth[1], and never disputed (because it could not be disputed) by Messrs. Corn and Comer:

> Scott Street now being the route one travels to and from Appellants' properties is the same street one traveled in order to enter the parking lots next to Appellants' properties prior to construction. The parking lots are located

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[1]Appellate Briefs are not assigned page numbers in the record.

> exactly now as they were before construction. Also, Scott Street has the same entrance and exit way to Appellants' properties as it did before construction.

Nonetheless, the Second Panel made the following, inaccurate statement about the decision of the First Panel:

> The landowners were [granted] the right to demonstrate by evidence, if they could, that Scott Street does not meet modern vehicular requirements, or that it was impassable at certain times, or that it provided insufficient driveway space for commercial vehicles, or that it in some way other than circuity was not reasonable access.

As this Court can see from the Opinion of the First Panel, the landowners were granted no such "right." As the Commonwealth had correctly said, neither Scott Street nor the driveways were altered in the slightest; the change was simply that to get to the entrances off of Scott

Street, a driver on South Broadway had to take one of two enormously circuitous routes. Our argument had been, and had been only:

> The Property owners would have shown the near impossibility of getting to their properties by the circuitous route left to them, and the devastation caused to their businesses (or any business at that location) which rely on customer traffic.

The true holding of the First Panel was acknowledged by the Commonwealth in its Motion for Discretionary Review to the Supreme Court after the First Panel's decision. It should be noted that underlining in the following quotation is in the original, and was not added by us:

> The property in question was moved from a direct route to the property to a different route. There is nothing more than a diversion of traffic or a circuitous route of travel.

* * * * *

> The Court of Appeals clearly acknowledges that the Respondents' complaint is nothing more than a circuitous route of travel after construction of the railroad underpass. It was further clear to the Trial Court that the claim was for nothing more than circuitous access of which the Trial Court dismissed the claim without hesitation since circuitous access is not a valid claim.

In short, it was simply indulging in a fiction[2] to suggest that Messrs. Corn and

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[2] It is a modest criticism to describe this incorrect repetition of the First Panel's Opinion as "indulging in [a] mere fiction." Toucey v. New York Life Ins. Co., 314 U.S. 118, 140 (1941). The Second Panel's second fiction, that its ruling is the traditional law of Kentucky, recalls the often-quoted concurrence of Justice Frankfurter in Griffin v. Illinois, 351 U.S. 12, 26 (1971) ("We should not indulge in the fiction that the law now announced has always been the law . . ."), except that Justice Frankfurter was talking about situations where there had been no law declared, whereas here the Second Panel reversed prior law while declaring that it was upholding it.

Comer might complain that Scott Street had become too narrow, or was temporarily closed, or that the entrances from Scott Street were altered -- or that anything was involved more than the "circuitous route" of 8/10ths of a mile or one mile and a half, with twists, turns and railroad tracks.

At that point, Messrs. Corn and Comer moved for Discretionary Review to the Supreme Court of Kentucky, arguing:

> The taking itself is a gross violation of the Movants' right to due process -- recognized for a century by this Court. It was far worse to make them spend tens of thousands of dollars to go through a massive judicial process, only to hear a Second Panel say that the determination of the First Panel was erroneous, and had merely offered them a "right" to prove facts they never alleged and

> knew were false. That is not justice under the law.

This was the first time after the first Notice of Appeal when it was necessary for Messrs. Corn and Comer to raise the first Question raised here; and this was, of course, the first time that the matter of the Second Panel's reversal of the First Panel (the second Question here) was mentioned. The Motion for Discretionary Review has not been assigned a page number in the record.

The Motion for Discretionary Review was denied.

The Prior Kentucky Law

It is of course irrelevant to a proper determination of the content of the Fifth and Fourteenth Amendments to the Constitution of the United States, whether or not Kentucky has had a distinguished or

undistinguished history of analysis of such issues prior to this case. This Court will make its own determinations directly under the Constitution, and the authorities of this Court. However, it is not without interest that the Commonwealth agreed, even in the Court of Appeals before the Second Panel, that the case of Commonwealth of Kentucky, Department of Highways v. Carlisle, 442 S.W.2d 294 (Ky. 1969), summarized the test on this subject -- that circuity may be forced on a property owner only "within reasonable limits." Id. at 297.

The Commonwealth was making no gratuitous concession, since there was no authority supporting the view adopted by the Second Panel. No authority whatever.

The Second Panel's assertion that DeRossette v. Jefferson County, 156 S.W.2d 165 (Ky. 1941), is the case "most similar

to the case at bar" is instructive. The Commonwealth did not even cite DeRossette in its original brief to the Second Panel -- while Messrs. Corn and Comer had, in fact, cited DeRossette as a leading authority (among a dozen other cases) in their own original Brief to the First Panel. In truth, the DeRossette property owner retained access to every street which abutted his property. In DeRossette, the lower portion of one of the abutting streets was cut off, so that a driver leaving the restaurant parking lot would have to swing his car around a few extra feet in the parking lot to get to the exit at the upper end of the lot. "[T]here may be a slight inconvenience to appellant and tenants in journeying southwardly," said the Kentucky court in DeRossette.

We cited DeRossette -- and continued in the Supreme Court of Kentucky to rely on

it -- because it cited the "typical case of an unreasonable obstruction," to wit: Illinois Cent. R. Co. v. Ward, 35 S.W.2d 863 (Ky. 1931), which is exactly like this case. To quote the DeRossette court, one of the ways to get to and from the Ward farm was blocked -- "compelling owners 'to travel...in the opposite direction...whenever it was necessary to travel to the west, north, and south of their residence located on the farm.'" DeRossette at 167, quoting Ward at 864. Ward is exactly this case. As is perfectly obvious, the Second Panel overruled a long line of Kentucky authority.

Ward is especially extraordinary because the argument made by the Second Panel was in fact made by the appellant there, and explicitly rejected by the Kentucky high court:

> The fact that some other means of access to the property may be available affects merely the amount, and not the right to the recovery of damages.

Id. at 865.

There was plenty of longstanding Kentucky authority for the proposition that there can be compensation even though some access remains. The First Panel was not alone. See, e.g., Commonwealth v. Tate, 181 S.W.2d 418, 420 (Ky. 1944) ("Access from the west is impossible and from the east has been rendered more difficult.")

(j) **REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.**

For reasons which are primarily cultural and political, this Court has not often had the occasion to consider the right of property owners to have reasonable access to the roadways on which their homes or businesses lie. That is in large part

because states and localities have built (and altered) most of the streets and highways of America. See Aero Mayflower Transit Co. v. Board of R.R. Commrs., 332 U.S. 495, 503 (1947) ("The state builds the highways and owns them. . . It is immaterial that the state receives Federal aid for state road construction . . ."). However, when this Court revolutionized the fundamental law upon which this action is based in the case of First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), it returned to the 1872 case of Pumpelly v. Green Bay & Miss. Canal Co., 13 Wall 166 (1872) to note its long-standing view of the "very curious and unsatisfactory result" obtained where formalistic distinctions deprived owners of the use of their property. 482 U.S. at 316-317 quoting 13 Wall at 177-188. The circle

(and the irony) becomes complete when one notes that in Pumpelly (which was decided before the 14th Amendment applied these rules to states) Justice Miller observed:

> We are not unaware of the numerous cases in the state courts in which the doctrine has been successfully invoked, that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers and other highways for the public good, there is no redress; and we do not deny that the principle is a sound one in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other state constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction, in favor of this principle, and in some cases beyond it. . .

Id.

As late at 1948, however, this Court continued its adherence to formalistic notions in riparian rights cases, still noting their similarity to highway cases, where unrestricted "police powers" were allowed by many states to impede the use of private property without compensation. Thus in United States v. Willow Rivers Power Co., 324 U.S. 499 (1945) Justice Jackson wrote:

> Operations of the Government in aid of navigation ofttimes inflict serious damage or inconvenience or interfere with advantages formerly enjoyed by riparian owners, but damage alone gives courts no power to require compensation where there is not an actual taking of property. . . The uncompensated damages sustained by this riparian owner on a public waterway are not different from those often suffered without indemnification by owners abutting on public highways by land. It has been held in nearly every state in the Union that "there can be no

> recovery for damages to abutting property resulting from a mere change of grade in the street in front of it, there being no physical injury to the property itself, and the change being authorized by law."

Id. at 510-511.

The results of this Court's poll of the various states would have changed, had the survey been taken even shortly thereafter, even before this Court began to change itself. This case will be decided by a vote of the Justices today, and not a vote of the states before (or after) First English Lutheran Church, but it is worth considering the trend that had already occurred, by making a review of the cases collected by J. Sackman, Nichols' The Law of Eminent Domain (3rd Edition 1990 with 1992 pocketpart), particularly Sections 6.09-6.11, 6.21[3] and 6.34-6.36. Formalistic distinctions (particularly

"police power" deprivations distinguished from physical "takings") had for the most part disappeared from state adjudication of these issues.

See also Annotation, Supreme Court's Views as to What Constitutes 'Taking,' Within Meaning of Fifth Amendment's Prohibition Against Taking of Private Property for Public Use Without Just Compensation, 89 L. Ed. 2d 977 (1986), which summarizes:

> In several early or relatively early cases, the United States Supreme Court indicated that government actions which do not directly encroach upon private property, but which have merely "incidental" or "consequential" effects on such property, do not constitute a "taking" of that property within the meaning of the just compensation clause.
>
> * * * * * *
>
> CAUTION: In view of the very different standards

> applied by the more recent decisions described in this section, and the apparently contradictory holdings of some of the cases in §4[a], infra, it would seem that the distinction between direct and incidental effects on property may no longer be a valid criterion in determining whether there has been a "taking" for purposes of the just compensation clause.

Id. at 991-992

Past history aside, the underlying support of the "very curious and unsatisfactory" past was undermined by Justice Brennan's dissent in San Diego Gas & Electric Company v. City of San Diego, 450 U.S. 621 (1981):

> It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a de facto exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.

Id. at 653.

It was quickly noted that Justice Brennan's view on this subject "represented the views of the majority of the Court on this issue," which had not prevailed as the majority opinion in San Diego Gas & Electric only because the case was decided on a finality issue. See, Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission, 729 F.2d 402, 408 (6th Cir. 1984). The seminal importance of the Brennan dissent is also widely recognized by commentators, as, for example, in Davis & Glicksman, To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses, 68 Or. L.Rev. 393 (1989).

The last cited article, despite (or because of) its persistent criticism of "the general movement of [this] Court to a jurisprudence more protective of property

rights," can be taken as a reliable source to declare the dramatic impact on this whole body of law of the cases which began with San Diego Gas & Electric. 68 Or. L.Rev. at 430 - 431. Say the commentators:

> All debate mercifully and abruptly ended with the Court's opinion in First English Evangelical Lutheran Church v. County of Los Angeles, in which a majority opinion by Rehnquist removed the quotation marks from the word "taking" by holding that all takings -- physical or regulatory -- were governed by the fifth amendment takings clause and required "just compensation."

Id. at 429.

We do not believe that this Court will need to go far to find the appropriate definition of a "taking" to be applied in cases like this one. It is the traditional Kentucky test; and it has already been applied by a trial judge in this case -- as directed by the First Panel. We have

stated a second Question in this case, which seeks to give preclusive effect on all matters determined by the First Panel. We did that because we sense in Christianson v. Colt Industries, 486 U.S. 800, 817-819 (1988), at least an ambivalence in this Court's attitude toward the old rule which would have denied that effect. That case involved a matter litigated wholly within the federal judicial system, which fact may explain the Court's firmer than usual treatment of the "law of the case." Perhaps a new rule is called for, however, when it was not arguable or "concluded that the prior decision was 'clearly wrong,'" and where the case involves "a state of affairs [which] would undermine public confidence

in our judiciary. . ."[3] Id. This case

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[3] The same distinction is made when this Court deals with determinations of the state courts as is made among determinations of federal courts. This Court recognizes determinations of state courts which are "res judicata and precluded dispute," and does not recognize determinations made by state courts which are properly characterized as merely "the law of the case." Southern Railway Co. v. Clift, 260 U.S. 316, 319 (1922). ("The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and res judicata; one directs discretion, the other supersedes it and compels judgment. In other words, in one it is a question of power; in the other of submission.").

There is authority for the proposition that Kentucky "incorporates the doctrine of res judicata into the law of the case rule." Burkett v. Board of Ed. of Pulaski Co., 558 S.W.2d 626, 628 (Ky. Ct. App. 1977). We are painfully aware that this Court, speaking through Justice Holmes, relegates constitutional status to prior opinions only under the traditional doctrine of res judicata, and not the typical "law of the case" situation. See, e.g., Remington v. Central Pacific Railroad Co., 198 U.S. 959 (1905); Messenger v. Anderson, 225 U.S. 1152 (1912). See also United States vs. United States Smelting Refining and Mining Co., 339 U.S. 186 (1950).

We believe, frankly, that in the context of this case, what was done by the Second Panel to the decision of the First

would be a perfect one to adopt that rule.

Irrespective of preclusive effect of the First Panel's determination on the legal test for a "taking," that case and

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Panel, and its implications on the expectations and livelihood of Messrs. Comer and Corn, rises to such a high level of shocking behavior that it should be protected by the Constitution. The effect on them is no less than in the case of Nevada v. United States, 463 U.S. 110 (1983): "But what we said with respect to this doctrine more than 80 years ago is still true today; it ensures 'the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals.'" 463 U.S. at 129. The doctrine of res judicata (more accurately, claim preclusion) is in the federal system applied between circuits in actions that are pending at the same time. Lummus Company v. Commonwealth Oil Refining Co., 297 F.2d 80 (2nd Cir. 1961), a case explicitly adopted by the Restatement of Judgments (Second) (1982) at pages 141-142. See also Brinkerhoff-Faris Trust & Savings Company, 281 U.S. 673 (1930).

all the prior Kentucky cases state the only appropriate rule to be adopted by this Court to define the line where compensation is required: "Reasonable access" must be left after the street improvement. We suggest that the case presently before the Court is a typical one, but one where it is perfectly obvious that, in the language of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the state's action "goes too far," 260 U.S. at 415; and where, in the language repeated in Kaiser Aetna v. United States, 444 U.S. 164 (1979), Messrs. Corn and Comer have had ripped away from them their "reasonable investment backed expectations." Id. at 175. In the place of "too far" in this case, one can fairly say "so far that the state has put the property owners out of business, converted their commercial properties to a parking lot or warehouse." In the place of merely

losing "reasonable investment backed expectations," one can fairly say in this case that the state has confiscated "a lifetime of investment and plans and hard work." The Commonwealth of Kentucky in this case did not merely act "unreasonably;" it acted egregiously.

Since this Court's Opinion in First English Evangelical Lutheran Church, some state courts have done pretty well on their own, and have applied the traditional Kentucky test. For example, the Florida court in Palm Beach County v. Tessler, 538 So.2d 846 (Fla. 1989), considered the case of commercial property on a major public road, where none of the owner's property was taken, but a highway improvement blocked off the normal access, creating "an indirect winding route of some 600 yards through a primarily residential neighborhood." Id. at 847. This was

described by the Court as "a tedious and circuitous route to reach their business premises," and thus "more than an inconvenience." Id. at 850. The Court applied the traditional Kentucky test:

> There is a right to be compensated through inverse condemnation when governmental action causes a substantial loss of access to one's property even though there is no physical appropriation of the property itself. It is not necessary that there be a complete loss of access to the property. However, the fact that a portion or even all of one's access to an abutting road is destroyed does not constitute a taking unless, when considered in light of the remaining access to the property, it can be said that the property owner's right to access was substantially diminished.

Id. at 849.

In such a case as that one (and this one):

> As a fact finder, the judge resolves all conflicts in the evidence. Based upon the facts as so determined, the judge then decides as a matter of law either the landowner has incurred a substantial loss of access by reason of the governmental activity. Should it be determined that a taking has occurred, the question of compensation is then decided as in any other condemnation proceeding.

Id. at 850.

The case of Merritt v. State, 742 P.2d 397 (Idaho 1987) is another useful one. In that case the initial opinion of the court determined that "the remaining vehicular access being reasonable, there was no taking of the Merritt property which would entitle him to compensation." The retained access was "reasonable," because the

highway improvement "might require a car . . . to drive an extra block." Id. at 400.

Before the mandate issued in Merritt, however, First English Evangelical Lutheran Church was decided; and a motion for rehearing filed. The majority in Merritt noted the applicability of this Court's decision, "and finds it to be factually distinguishable as to the extent of the denial of use of the property." Id. at 405. The difference between "an extra block" (Merritt) and "600 yards [of] tedious and circuitous" driving (Tessler) now becomes the focus of right-thinking state courts -- just as it used to be in Kentucky. Other courts have also noted the applicability of First English Evangelical Lutheran Church to "circuitous travel" cases. See, for example, Three D

Corporation v. Salt Lake City, 752 P.2d 1321, 1323 (Utah App. 1988).

A final state court case needs to be cited, again, not because this Court is in the business of counting heads, but because of the irony involved. In State, Commissioner of Transportation v. National Amusements, Inc., 581 A.2d 1353 (N.J. Super Ct. App. Div. 1990), the New Jersey Court, actually citing the then-existing Kentucky law, decided a case correctly according to the principles of First English Evangelical Lutheran Church:

> [L]imitation of access, so long as reasonable access to the highway system remains, is not a taking by eminent domain, but is accomplished under the police power, and is not compensable. Commonwealth, Dep't of Highways v. Denny, 385 S.W.2d 776, 777 (Ky. 1964).
>
> * * *
>
> Denny . . . focuses the inquiry not upon

> direct access, but rather upon the reasonableness of the alternative access . . .

Id. at 1355 - 1356.

In the defense of Kentucky's traditional "reasonable access remaining" analysis, we again cite the Davis & Glicksman article, which, for all its hostility toward this Court's wide recognition of property rights, plainly supports the application of Kentucky's traditional test of this case:

> As noted in the introduction to this Article, taking clause jurisprudence has always emphasized individual impact. In determining when regulation has "gone too far," the Court has consistently emphasized that the "Fifth Amendment guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The presence or absence of

> reciprocity of advantage is as powerful a tool as the Court has at its disposal to make such a judgment. While other factors can be helpful, nothing goes more to the heart of the individual impact question than whether the restriction is part of a larger regulatory fabric that brings benefits as well as burdens to those whose property it affects.

Id. at 457.

The Second Panel of the Court of Appeals of Kentucky, when it misstated the contents of the Opinion of the First Panel, was presumably making some sort of effort to explain why it did not feel bound by the law already reaffirmed in this particular case. At footnote 3 above we acknowledge that this Court might be disinclined to make "the law of the case" a binding rule at this time. The inaccurate statement of the First Panel's Opinion, however, suggests a final point worth making on the

first Question raised: It is suggested by the Second Panel that the Fifth and Fourteenth Amendments to the Constitution of the United States might be offended if Scott Street, or the driveway off of Scott Street into the Comer or Corn properties, were made more narrow -- or less "modern." The Constitution would be offended, suggests the Second Panel, by a narrow access -- but is not offended by a "merely" long, circuitous access. A McDonalds might without compensation be compelled to send its customers 15 miles through six neighborhoods for a hamburger, but not through a 15 foot entranceway. That would be "curious and unsatisfactory" constitutional law indeed.

Messrs. Corn and Comer are, in short, entitled to have their livelihoods restored.

Respectfully submitted,

MILLER, GRIFFIN & MARKS, P.S.C.
700 Security Trust Building
271 West Short Street
Lexington, Kentucky 40507

BY _____
ROBERT S. MILLER
ATTORNEYS FOR APPELLANTS

rsm/pldgs/comer-2.app

APPENDIX

FAYETTE CIRCUIT
CIVIL BRANCH
SECOND DIVISION

RAYMOND COMER
and MARION CORN PLAINTIFFS

V. ORDER OF DISMISSAL NO. 87-CI-4114

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS DEFENDANT

*** *** ***

This cause having come on for hearing on Defendant's Motion to Dismiss, the parties having filed Memorandums of Law and having made oral arguments, and the Court being otherwise sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. It appearing from the oral arguments that the parties are in agreement on certain factual matters that may be of assistance to any appellate court that may

review this Order, the parties are directed to file a Stipulation of Facts;

2. Defendant's Motion to Dismiss is sustained.

Dated this the 15th day of June, 1988.

/s/N. Mitchell Meade
JUDGE, FAYETTE CIRCUIT COURT
SECOND DIVISION

TO BE ENTERED:
NOTICE OF ENTRY WAIVED:

/s/Thomas C. Marks
ATTORNEY FOR PLAINTIFFS

/s/Louis Kawaja
ATTORNEY FOR DEFENDANT

RENDERED: April 20, 1989; 10:00 A.M.

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 88-CA-1345-MR

RAYMOND COMER
and MARION CORN APPELLANTS

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE N. MITCHELL MEADE, JUDGE
CIVIL ACTION NO. 87-CI-4114

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS APPELLEE

VACATING AND REMANDING

* * * * *

BEFORE: DYCHE, ELSWICK and LESTER, Judges.

LESTER, JUDGE. This is an appeal from an order in an inverse condemnation action dismissing the complaint.

Raymond Comer and Marion owned certain properties fronting on South Broadway in Lexington upon which they operated a hotel, lounge, and restaurant. In 1987, the Department of Highways constructed a

railroad underpass, the effect of which was to eliminate direct access to appellants' land from Broadway and cause that ingress and egress to be lengthened by eight tenths of a mile over route which, at least in part, utilized Scott Street. None of the appellants' tracts were taken for the project and their complaint centers around the circuitous access.

Subsequent to the filing of the complaint the appellee moved to dismiss and memoranda was ordered to be filed by both parties supporting their respective positions. No evidence was adduced but oral arguments were heard by the court at a regular motion hour after which the following order was entered:

IT IS HEREBY ORDERED AND ADJUDGED as follows:

> 1. It appearing from the oral arguments that the parties are in agreement on certain factual matters that

> may be of assistance to any appellate court that may review this Order, the parties are directed to file a Stipulation of Facts;
>
> 2. Defendant's Motion to Dismiss is sustained.

The main thrust of this appeal centers around the reasonableness of the access to appellants' businesses or, to put it another way, is the additional eight tenths of a mile from Broadway such an unreasonable span as to warrant compensation. One of the most recent authorities upon the subject of unreasonableness of access following condemnation where none of the complainant's land was actually taken is Commonwealth, Department of Highways v. Jent, Ky., 525 S.W.2d 121 (1975), where the court pointed out:

> In Commonwealth, Department of Highways v. Carlisle, Ky., 363 S.W.2d 104, we held that the only access right

> that the landowner has is a right of reasonable access to the highway system. In Commonwealth, Department of Highways v. Adkins, Ky., 396 S.W.2d 768, we held that, conversely, the landowner cannot be deprived of reasonable access without just compensation. The question of reasonableness of access must be dealt with on a case-by-case basis. Ordinarily, whether the landowner has been deprived of reasonable access is a question of law which should be resolved by the court, but in order for it to be resolved at all it is indispensable that the facts be disclosed. Adkins, supra.

From the foregoing, we discern that it is the trial court's function to determine what is reasonable access and in order to do so evidence must be heard. In the case at bench, although it might be assumed that in dismissing the complaint the court viewed appellants' ingress and egress to be reasonable, it is axiomatic that the court speaks only through its orders, opinions or

judgments and we have no specific finding on the prime issue of the litigation. Moreover, Raymond and Marion argue that they are entitled to present evidence and it is the mandate of Jent that they be allowed do so.

The judgment is vacated and the cause remanded for proceedings consistent herewith.

ALL CONCUR

ATTORNEYS FOR APPELLANTS	ATTORNEY FOR APPELLEE
Hon. Robert S. Miller Hon. Thomas C. Marks Miller, Griffin & Marks, P.S.C. Lexington, Kentucky	Hon. Louis Kawaja Lexington, Ky.

SUPREME COURT OF KENTUCKY
89-SC-386-D
(88-CA-1345-MR)

TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS
COMMONWEALTH OF KENTUCKY MOVANT

V. FAYETTE CIRCUIT COURT
87-CI-4114

RAYMOND COMER, ET AL. RESPONDENTS
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

ORDER DENYING MOTION FOR
DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Stephens, C. J., not sitting.

ENTERED August 30, 1989.

/s/ William M. Gent
Acting Chief Justice

FAYETTE CIRCUIT
CIVIL BRANCH
SECOND DIVISION

RAYMOND COMER
and MARION CORN PLAINTIFFS

V. NO. 87-CI-4114

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS DEFENDANT

* * * * *

TRANSCRIPT OF THE EVIDENCE AND PROCEEDINGS

OF THE NON-JURY TRIAL HEARD ON

JANUARY 31, 1990

Juanita Stollings
Official Court Reporter
401 Courthouse
Lexington, Kentucky 40507
606 233-0817

RULING OF THE COURT:

THE COURT: Well, I happen to agree with your law, but the Court of Appeals does not. And since they are second and last to speak, I have no alternative but to follow their ruling. They have directed I hold this hearing as to whether or not access to these two business establishments are reasonable.

I have heard evidence in that regard additionally. Courts are entitled to take judicial notice of those matters which are of common knowledge in the community. Having been a resident of this community for a great number of years, being familiar with Mr. Comer and his establishment since at least 1962 in several regards, knowing the type of business he receives, where that business comes from, it will be the Court's conclusion that Mr. Comer's access

has been diminished by at least sixty percent.

What's the name of the hotel?

MR. KAWAJA: Used to be the Scott Hotel.

THE COURT: The Scott Hotel has been reduced by about forty percent. Again, taking into play my judicial knowledge that the Scott Hotel at one time was principally for use by the people who worked for the railroad, whereas, Mr. Comer draws not only from the railroad people who used to work on the railroad but the entire community and substantial number of patrons from the University of Kentucky students.

So with that, it's the Court's determination that the access is not reasonable by virtue of the building of the underpass. Being a traveler of Broadway, I'm very happy to see the underpass being built because I don't have to worry about being killed now by trains.

I might add that one of the reasons I'm talking about these diminishing mattes is I'm aware that Mr. Comer's business is not the same business it was fifteen years ago.

Hopefully, you fellows now can reach a conclusion. I have a rule in the Second Division that nothing bigger than what can be placed in a file folder cannot be -- but you might, if you want to appeal this matter at some future date, substitute that for the record, but then if you go up on appeal to the Court of Appeals or Supreme Court, then you can take those up so they can see them better. They're not as familiar with this location as I am.

MR. KAWAJA: Your Honor, may I ask if the Court would entertain making this an appealable matter at this point and then coming back for damages?

THE COURT: The Court's findings of fact and conclusions are as dicatted into

the record. I say look at 'me latter and shudder at my grammar and English that I've used; but, nonetheless, that's going to be my findings of fact and conclusions. Let this be a final and appealable order. Maybe one of these days we'll get this case over with while Mr. Comer and I are still living.

THEREUPON, at 2:28 p.m., the hearing was concluded.

FAYETTE CIRCUIT
CIVIL BRANCH
SECOND DIVISION

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS — APPELLANT

VS. — NO. 87-CI-4114

RAYMOND COMER
AND MARION CORN — APPELLEES

* * * * *

TRANSCRIPT OF THE EVIDENCE AND PROCEEDINGS

OF THE TRIAL HELD ON

DECEMBER 17, 1990

Juanita Stollings
Official Court Reporter
401 Courthouse
Lexington, Kentucky 40507
606 233-0817

THE COURT: Overruled. As I've said throughout this litigation, I am in disagreement with the ruling of the appellate court, but twice I have attempted to resolve the matter and twice the appellate court sent it back. I was harking back to the days of Frisch's Restaurant on Harrodsburg Road when they four-laned the highway. There were two problems in that case. One, as to whether or not the lessee was entitled to show the value of their lease separate and apart from the total value of the property, and, second, whether or not lack of access or limited access to a highway was compensable. And the appellate court, at that time the highest court, in both cases said lack of access or limited access is not compensable. Two, the property has to be valued as a whole. And I'm not aware of any case which has changed that law, but somewhere along the line maybe the

appellate court is desirous of changing what our law might be and maybe they want a new start at it, so I'm attempting to give them a new start. I've never hesitated to let 'me know what I think about a matter, but that's their decision they have to make, not mine.

RENDERED: DECEMBER 20, 1991; 10:00 A.M.
TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

91-CA-137-MR

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE N. MITCHELL MEADE, JUDGE
CIVIL ACTION NO. 87-CI-4114

RAYMOND COMER and
MARION CORN APPELLEES

REVERSING

* * * * * * * * * * * * * * * * * *

BEFORE: HOWERTON, SCHRODER and WILHOIT, Judges.

HOWERTON, JUDGE. The Commonwealth of Kentucky, Transportation Cabinet, Department of Highways appeals from a determination of the Fayette Circuit Court that Raymond Comer and Marion Corn were

denied reasonable access to their properties when the state constructed a railroad underpass on South Broadway in Lexington. After the trial court concluded there was a public taking of the land, a jury awarded $240,000 to Comer and $111,000 to Corn.

In a previous proceeding, the trial court concluded that there was no compensable taking. As that decision was apparently based on the judge's personal knowledge of the situation, this Court reversed the judgment and remanded for a trial and findings. Judge Meade committed a procedural error in the first proceeding, but he apparently had a correct understanding of the substantive issue. On remand, he heard the evidence and made his findings, but on the ultimate question of a compensable denial of reasonable access, he erred as a matter of law. We reverse.

Comer and Corn each owned property at the intersection of South Broadway and Scott Street in Lexington prior to construction of the railroad underpass in 1987. Before construction, the public had access directly from South Broadway to Scott Street in front of the properties, on which each was operating a business. After construction of the underpass, the properties did not have direct vehicular access to South Broadway but continued to have direct access only to Scott Street. It is now necessary to drive approximately nine-tenths of a mile over Scott Street and other adjacent streets to get to these properties from Broadway. There was no physical taking of any part of either the Comer or Corn property.

Comer and Corn filed the first appeal to this Court after the trial court dismissed their original complaint, which

alleged deprivation of a right of reasonable access to the highway system, resulting in an unauthorized taking without just compensation. This Court vacated and remanded the case, holding that the trial court must hear some evidence in order to determine the issue. This Court noted that, although it appeared from the order of the trial court that Judge Meade believed the property owners were not denied reasonable access, the court had failed to make any specific finding or cite any legal authority regarding the issue of reasonable access. This Court's earlier opinion did not mandate a judgment for Comer and Corn. After this Court's decision, the Commonwealth's motion for discretionary review was denied.

On remand, the trial court held an evidentiary hearing. Comer and Corn introduced evidence of circuity of travel

and diversion of traffic, as well as evidence from which loss of business could be inferred. After all the evidence was presented, the trial court ruled that the property owners had lost reasonable access. A jury trial to determine damages was held over the Commonwealth's objection. The jury awarded Comer $240,000 and Corn was awarded $111,000. The Commonwealth now appeals to this Court to review the trial court's decision regarding reasonable access, along with the issues regarding the evidence presented to the jury and its verdict.

The Commonwealth argues that the evidence presented at the hearing, when considered in light of the legal standards enunciated in the case law, was insufficient to support the conclusion that Comer and Corn had lost reasonable access

to their properties. We believe this argument is sound.

Initially, it appears that the trial judge misconstrued the directive from the first appeal of this case. The deficiency noted on that appeal was the absence of any finding or conclusion of law based on evidence that the remaining access to the Comer and Corn properties was either reasonable or unreasonable. This Court's decision was required by the rule enunciated in Commonwealth, Department of Highways v. Adkins, Ky., 396 S.W.2d 768 (1965). Ordinarily, whether the landowner has been deprived of reasonable access is a question of law which should be resolved by the court, but in order for it to be resolved at all, the facts must be disclosed.

No evidentiary hearing was held, although a stipulation was filed. The

landowners were denied the right to demonstrate by evidence, if they could, that Scott Street does not meet modern vehicular requirements, or that it was impassable at certain times, or that it provided insufficient driveway space for commercial vehicles, or that it in some way other than circuity was not reasonable access. This Court expressed no opinion as to what that ultimate determination should be. It only required that the narrow issue of reasonable access be addressed.

The evidence adduced at the hearing on remand showed that Comer and Corn retained access to their properties via Scott Street; however, in order to get to their properties from that portion of South Broadway which adjoins their properties, one must drive approximately nine-tenths of a mile. It is well-settled law in Kentucky that reasonable restriction of access,

rerouting of public highways, and circuity of travel caused thereby are not legally compensable. Commonwealth, Department of Highways v. Diuguid, Ky., 469 S.W.2d 707 (1971); Commonwealth Department of Highways v. Rosenblatt, Ky., 416 S.W.2d 754 (1967). Clearly, governments must have the authority to grant or deny parking on streets, establish one-way traffic, allow or deny curb-cuts and driveways, erect dividers and safety barriers in streets, and other such things to improve traffic flow and safety.

DeRossette v. Jefferson County, 288 Ky. 407, 156 S.W.2d 165 (1941), the case most similar to the cast at bar, involved a property owner's claim that an underpass built by the county destroyed his property without payment of just compensation. The owner alleged that the road alteration interfered with traffic moving along a

heavily-travelled road on which he was conducting a profitable business. The underpass construction rerouted or diverted traffic to the new highway. This led to loss of business and depreciation in the value of his real property.

The DeRossette court thoroughly examined the case law and distinguished the cases where a compensable loss was found. Unreasonable obstruction in which all means of ingress were destroyed was a common theme found in several of the cases where compensation was awarded. This was the situation in Henderson v. City of Lexington, 132 Ky. 390, 111 S.W. 318 (1908), and Illinois Central Railroad Company v. Ward, 237 Ky. 478, 35 S.W.2d 863 (1931). The DeRossette court further noted that other cases with compensable damage existed when there was unreasonable interference with ingress and egress or

there was a wrongful or illegal obstruction of a public road. The court found Cranley v. Boyd County, 266 Ky. 569, 99 S.W.2d 737 (1936), to be an example of unreasonable interference when a county engineer closed access to an old road used by the plaintiff when the barriers effectively destroyed her ingress and egress to that road. The Cranley court limited its holding to the facts and specifically stated that "[no] compensation [will] be required where a change in a road results merely in personal inconvenience or injury, such as to trade or business by diverting traffic, or compels a more circuitous route of access." 266 Ky. at 573.

Although Comer and Corn rely on Henderson, supra, and Ward, supra, these cases are easily distinguishable from the present case. Here, we do not have a complete destruction of ingress and egress

to and from the subject properties. Neither do we have an unreasonable obstruction as presented in Cranley. Also, we note that the remainder of the cases cited by Comer and Corn involved a physical taking from the abutting properties and are thus distinguishable.

DeRossette, supra, and the cases discussed therein, indicate that where there is only a diversion of traffic or a circuitous route of travel suffered by the property owner, there is to be no compensation. In the case before us, it is evidence that the public has to take another route from South Broadway to the Comer and Corn properties. But, as the Commonwealth points out in its brief, if one is east of the properties, the Scott Street route is still the same.

The DeRossette case was cited with approval in Department of Highways v.

Jackson, Ky., 302 S.W.2d 373 (1957), which was an action by an owner for depreciation of land value when a county road between his property and a nearby town was closed. The court held that the closing of the county road at one end did not deprive the owner of reasonable access from his land to the highway system and that he was therefore not entitled to damages, even though the closing required taking a slightly longer route to the nearby town. The court noted that past decisions had made a distinction between county highways and city streets as to the rights of abutting landowners to continued maintenance. The rule had been that a landowner along a county road had no property right in the continued maintenance of that road, while a landowner along a city street had a right, in the nature of a private easement, to the continued

maintenance of platted or dedicated streets. 302 S.W.2d at 374. In specifically holding that this distinction be abolished, the court declared "that the rule governing city streets shall be the same as that herein stated for county roads." Id. at 376. Jackson overruled all earlier cases in conflict with this new rule, including, to this extent, Cranley, supra, and Ward, supra.

In conclusion, we recognize the difficulties frequently presented by inverse condemnation cases, and the resulting hardships often experienced by the parties involved. However, it is not for this Court to carve out any exceptions to the general rule of law applicable to cases such as this. The inherent nature of the circumstances involved in such cases has required that rules be created, which may sometimes be viewed as arbitrary, but

which in fact provide workable, objective standards. Neighborhoods, traffic patterns, safety requirements, and the like change over time, and governments must not always be required to compensate a property owner for every inconvenience or loss of business. The facts here present a case of noncompensable damage. The trial judge gathered the evidence as required but then reached the wrong conclusion of law. Because we find that there is no support in the case law to hold that Comer and Corn were denied reasonable access to their properties as a result of the construction of the underpass, we decline to address the remaining issues raised by the Commonwealth.

The judgment of the Fayette Circuit Court is reversed.

ALL CONCUR.

ATTORNEY FOR APPELLANT:

Louis Kawaja
Lexington, KY.

ATTORNEYS FOR APPELLEES:

Thomas C. Marks
Robert S. Miller
MILLER, GRIFFIN & MARKS
PSC
Lexington, KY.

SUPREME COURT OF THE UNITED STATES
92-SC-20-D
(91-CA-137-MR)

RAYMOND COMER, ET AL. MOVANTS

V. FAYETTE CIRCUIT COURT
87-CI-4114

COMMONWEALTH OF KENTUCKY RESPONDENT
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Stephens, C. J., not sitting.

ENTERED April 1, 1992.

/s/ Charles M. Lester
Deputy Chief Justice